Office-Supreme Court, U.S.
FILED
JAN 23 1962
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM 1961

No. 683

RAUL PINTO,
Petitioner,

against

STATES MARINE CORPORATION OF DELAWARE,
Respondent.

GEORGE HOOPER,
Petitioner,

against

TERMINAL STEAMSHIP COMPANY,
Respondent.

GEORGE EZEKIEL,
Petitioner,

against

VOLUSIA STEAMSHIP CO., and
SUWANEE STEAMSHIP CO.,
Respondents.

GEORGE RICHTER,
Petitioner,

against

MATHIASEN'S TANKER INDUSTRIES, INC., and S.S. MICHAEL J. her engines, hull, tackle, cargo and her appurtenances thereof,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals

for the Second Circuit entered in the above causes as follows:

Raul Pinto, October 26, 1961
George Hooper, November 24, 1961
George Ezekiel, December 15, 1961
George Richter, December 26, 1961

Opinions Below

The opinions of the Court of Appeals in these cases are not reported as yet. The opinions are printed in full in the appendix herein.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and 2101. The joint petition is authorized by Rule 23, subd. 5 of the Rules of the Supreme Court of the United States.

Questions Presented

Three seamen and one longshoreman petition for a writ of certiorari to review the interpretation of the concept of warranty of seaworthiness applicable to maritime accidents.

1. Which is the correct interpretation of the concept of warranty of seaworthiness; the concept that the warranty is of a positive, affirmative and continuing nature, as expressed by Circuit Judge Clark and Circuit Judge Smith in their dissenting opinions,* or that the warranty may be invoked only upon proof of negligent causation and notice, but in no event, applicable to dangerous unsafe seaboard conditions which are inherent in the nature of the work, as held by the Court below?

2. Is it within the province of a Circuit Court of Appeals to enunciate limitations as to time, place and circumstances as to the duty of a shipowner to provide a seaworthy vessel to its crew and longshoremen working aboard ship, and

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* Footnote Appendix.

thus by erroneous and unauthorized judicial legislation destroy well recognized and established substantial rights of accident victims in maritime service.

In addition to the aforesaid questions which are common to all the petitions, petitioner Pinto prays for consideration and review of the following additional question:

3. Is a Circuit Court of Appeals acting within its province when it refuses to consider an exception to an erroneous charge, on the basis that the exception was not made in accordance with the use of precise language which the Court of Appeals felt should have been used? Is it not rather the duty of the Trial Court to instruct the jury as to the correct meaning of the warranty of seaworthiness, irrespective of any request to charge, and the duty to correct an erroneous charge specifically called to the Trial Court's attention, regardless of the phraseology of the exception or the request to correct the error?

Statement

This is a consolidated appeal brought by three crew members and a longshoreman, involving two common questions of law and a separate question, in addition thereto, by petitioner, Pinto.

Statement of Facts as to Petitioner Pinto

Pinto was a seaman aboard the SS. Clovis Victory, a government owned vessel which defendant operated. While the ship was at sea, the third mate directed Pinto and a helper, Fantroy, to carry a heavy signal light from the wheel-house to the engine room for repairs. In descending the ladder leading into the engine room, Pinto slipped and fell, allegedly sustaining a serious injury to his back. The action, in which Federal jurisdiction was predicated upon the Jones Act, 46 U. S. C. § 688, was brought on the "law" side, with a jury trial demanded.

The case was submitted to the jury solely on the basis of unseaworthiness, a claim of negligence having been withdrawn by the plaintiff. The jury found for defendant, and judgment was entered accordingly. Only two of the three theories of unseaworthiness advanced below require consideration here[1]—"operating" unseaworthiness, in that some other method should have been adopted for conveying the light to the engine room, and unseaworthiness based on the alleged presence of grease or oil on the step of the ladder where Pinto slipped.

The foregoing is a factual summary which is literally quoted from the opinion by the Court below, decided October 26, 1961, Chief Judge Lumbard, Circuit Judges Friendly and Smith, Circuit Judge Smith dissenting, affirming the decision of the judgment entered on the jury's verdict.

A petition for rehearing in banc, submitted on November 9, 1961 and decided on November 28, 1961, was denied per curiam, Circuit Judge Clark and Circuit Judge Smith dissenting.

Statement of Facts as to Petitioner, George Hooper

This was a civil action tried by United States District Judge David N. Edelstein without a jury. On March 22, 1961, judgment was entered dismissing the complaint.

Petitioner's case is set forth by Judge Edelstein in his findings of fact as follows:

> "17. On June 27, 1954, George Hooper and a fellow longshoreman known as Eugene Gatto were engaged in crating, jacking and compiling drafts of

[1] The third was that the step on which Pinto fell was worn and slick; no complaint is made with respect to the charge on that score and the fact thus must be taken as established for the defendant by the verdict.

lumber in such a manner as to enable the ship's gear to lower them over the side.

18. Between 2:30 and 3:30 p. m. on June 27, 1954, Hooper and Gatto were working in the vicinity of the No. 4 and No. 5 hatches preparatory to discharging a draft of lumber some 5' high, and 12' to 14' in length. The draft was loaded fore and aft and the top layer of the after end fanned out, requiring straightening.

19. In the process of preparing the load for discharging; Hooper faced the draft of cargo with his back toward the rail near the offshore side of the vessel, sank a cargo hook into the board furthest away from him and started to pull a plank into position. While in the act of so doing, the footing, consisting of further lumber cargo, shifted so as to cause Hooper to be thrown off balance to his side. As Hooper lost his balance, he tried to steady himself by holding on to the hook, but the hook twisted out of the plank and Hooper, with the hook in his hand, fell over the side of the ship into the water, some 35' below."

On November 24, 1961, the Circuit Court of Appeals, Chief Judge Lumbard, Circuit Judge Medina and Circuit Judge Waterman, affirmed the decision of the Trial Court.

Statement of Facts as to Petitioner, George Ezekiel

The facts are set forth in the following excerpt from the decision of December 15, 1961, by Circuit Judges Clark, Hincks and Friendly, opinion by Judge Friendly:

"Plaintiff, a Honduran seaman, brought this action in 1957, in the District Court for the Southern District of New York, against a Liberian corporation for an injury to his eye suffered while he was chipping rust aboard M/V Arctic Reefer, a Liberian vessel, in Guatemalan waters. The action was brought on the "law" side, and a jury trial was demanded. In

the spring of 1961, plaintiff consented to a transfer to the "admiralty" side, withdrew the claims asserted for maintenance and cure and for negligence under the Jones Act, 46 U. S. C. § 688, and agreed to proceed solely on a theory of unseaworthiness. It was stipulated that liability was governed by Liberian law and that Liberia has adopted the nonstatutory general maritime law of the United States.

Plaintiff's evidence on the issue of liability consisted of his own deposition and the testimony of a Captain Mandrill, called as an expert. Shortly after 8 A. M. on May 19, 1956, plaintiff began to chip rust, with a hammer, from a blower on the top of the deck above the engine room. About an hour later a piece of rust flew off and hit his right eye. He was not wearing goggles. He claimed that he had none, that the boatswain kept them, that he had asked the boatswain for some before starting work, and that the boatswain claimed to have no more. He was unable to recall the name of the boatswain, although he had been on the ship for almost a year. Mandrill testified it was bad practice for a boatswain to allow a seaman to chip rust without wearing goggles."

The Court below, Chief Judge Lumbard, Circuit Judge Medina and Circuit Judge Waterman, affirmed the Trial Court's decision on December 26, 1961.

Circuit Judge Clark dissented.

Statement of Facts as to Petitioner, George Richter

The following findings of fact by Trial Judge G. G. Noonan set forth the factual situation.

"FINDINGS OF FACT

1. The libelant, an alien seaman, was employed in the capacity of Second Assistant Engineer on board the S.S. Michael J, a tanker of Liberian registry, at monthly wages of $325.

2. The respondent, Mathiasen's Tanker Industries, Inc., was and is a foreign corporation licensed to do business in the State of Pennsylvania.

3. The respondent, Mathiasen's Tanker Industries, Inc., managed, operated and controlled the merchant vessel S.S. Michael J.

4. The libelant served on board the S.S. Michael J from October 1, 1957 until October 31, 1957.

5. On October 11, 1957 the S.S. Michael J departed from San Juan, Puerto Rico, in ballast for Jacksonville, Florida.

6. On October 17, 1957, between the hours of 9:00 A. M. and 10:00 A. M., the libelant proceeded to the boiler room of the S.S. Michael J to check or inventory the spare parts.

7. The spare parts were stored on shelves in a small room located on the port side of the engine room.

8. In the course of making his check the libelant stood on a metal shelf about one foot off the deck. To steady himself the libelant held on to a higher shelf with his left hand.

9. No ladder was available to the libelant for use in making his check and, in fact, due to the size of the storeroom, the use of a ladder was not feasible.

10. The libelant fell from this position and landed on the deck. As a result of his fall he sustained personal injuries the most serious of which was a fracture of the right ankle."

The Court below, Chief Judge Lumbard, Circuit Judge Medina and Circuit Judge Waterman, affirmed the Trial Court's decision on December 26, 1961.

Reasons for Granting the Writ

1. The decisions by the Court below violate the admonitions of the Supreme Court and establish concepts of law in conflict with uniform and prevailing opinion of all other Courts. This error would probably have been corrected by the Court below "*in banc*" but for "a panel precedent".*

In the words of Circuit Judge Clark, in the dissenting opinion in the *Ezekiel* case, *supra*:

> "This view confuses the nature of the obligation, however, because it suggests that liability is limited to defendant's negligence. It seems to be an attempt to introduce negligence concepts by the back door, as it were, utilizing the rule that a seaworthy ship and its appurtenances need only be "reasonably fit for their intended use" to evade the Supreme Court's repeated admonitions that "the duty to provide a seaworthy ship depends not at all upon the negligence of the shipowner or his agents." Mitchell v. Trawler Racer, Inc., supra; 362 U. S. 539, 548. See also Pope & Talbot, Inc. v. Hawn, 346 U. S. 406; Alaska S.S. Co. v. Petterson, 347 U. S. 396; Rogers v. United States Lines, 347 U. S. 984; Boudoin v. Lykes Bros. S. S. Co., 348 U. S. 336."

2. The decision by the Court below constitutes a radical departure from the law as laid down by the Supreme Court.

In the words of Circuit Judge Smith, in his dissenting opinion in the *Pinto* case, *supra*:

> "This seems to me to import a time element into the concept of seaworthiness which time element was rejected by the Supreme Court in Mitchell v. Trawler Racer, Inc. (1960), 362 U. S. 539."

3. The Court below has, in fact, adopted the minority view of the Supreme Court, rather than the prevailing opinion in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 80 S. Ct. 926, as stated by Circuit Judge Clark in his dis-

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* See dissent *Pinto* petition for rehearing *in banc*. *Pinto* case by Circuit Judge Clark, concurred in dissent by Judge Smith.

senting opinion in *Pinto, supra*, when the petition for a rehearing in banc was denied, Judge Clark stating as follows:

> "Judge Smith's compelling dissent points up a developing problem stemming from discontent with the Supreme Court's expansion of the concept of *unseaworthiness* on the part of those brethren who find themselves in greater sympathy with the views of the dissenters than those of the majority in the quite similar case of *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539. I suggest that a reading of the opinions there, particularly the dissenting opinions, against the opinions herein, will support this conclusion. And the problem is bound to recur often in view of the large number of these cases coming before each panel of our court. The intellectual reaction is understandable, since the minority view was powerfully presented. But whatever we may feel as to the merits of the debate, our duty is surely to apply the presently prevailing law and leave the question of further change to the Court itself. Furthermore, the Court's manifest intent to safeguard human lives at sea and to enforce the shipowner's responsibility by strict liability is not one to combat. But the trend here illustrated toward divergent precedents will make decision increasingly embarrassing for us."

Circuit Judge Clark in the foregoing dissent, in which Circuit Judge Smith concurred, states that the decision by the Court below is believed by him to be contrary to "* * * the clear mandate of the Supreme Court * * *."

4. Conflicting interpretations have now been created by the Court below which require clarification. The decision by the Court below constitutes an intracircuit conflict as to the correct interpretation of a shipowner's duty of seaworthiness.

5. The decisions by the Court below constitute the promulgation of a new concept and radical departure from the interpretation repeatedly enunciated by the Supreme Court of the United States, as to the affirmative, positive and non-delegable duty of a shipowner to provide his crew and busi-

ness invitees, engaged in traditional duties of seamen, with a safe place to work; whereas, heretofore, due care, absence of fault and assumption of risk were not available as defenses to an action bottomed on breach of warranty of seaworthiness, decisions now sought to be reviewed, if permitted to stand, would constitute nullification of well established legal rights. Defenses heretofore held inapplicable in such martime matters would constitute a complete bar to recovery.

6. This new concept now requires affirmative proof of negligent causation, notice and freedom from inherent danger, as conditions precedent for invoking the doctrine of seaworthiness in an action for shipboard accidental damages. This is clearly contrary to the holdings by the Supreme Court of the United States in all prior comparable matters.

7. In conflict with the holding by the Supreme Court in the case of *Hawn* v. *Pope & Talbot*, 346 U. S. 406, 74 S. Ct. 202, and the case of *Troupe* v. *Chicago, D. & G. Bay Transit Co.* (1956), 234 F. 2d 253, and authorities therein cited at pages 259, 260[2], the burden of assuring a charge in accord-

[2] "Plaintiff's position having been made known to the court at the time the ruling was first sought she was not required to repeat the objection when defendant renewed its motion and when the court granted the motion. *Keen* v. *Overseas Tankship Corp.*, 2 Cir., 1952, 194 F. 2d 515, certiorari denied 343 U. S. 906, 72 S. Ct. 1061, 96 L. Ed. 1363; *Sweeney* v. *United Feature Syndicate*, 2 Cir., 1942, 129 F. 2d 904; *Williams* v. *Powers*, 6 Cir., 1943, 135 F. 2d 153, 156; *Green* v. *Reading Co.*, 3 Cir., 1950, 183 F. 2d 716, 719. A point is properly preserved when a party has made known his objection to the trial court and stated the grounds on which he bases his objection. *Keen* v. *Overseas Tankship Corp.*, *supra*; *Irvin Jacobs & Co.* v. *Fidelity & Deposit Co. of Maryland*, 7 Cir., 1953, 202 F. 2d 794, 800-801, 37 A. L. R. 2d 889."

"Without attempting to state a rule or delineate situations in which it would be proper to exercise this discretion in favor of an appealing party, we think the language in *United States* v. *Atkinson*, 1936, 297 U. S. 157, 160, 56 S. Ct. 391, 392, 80 L. Ed. 555, and quoted with approval in *Johnson* v. *United States*, 1943,

ance with the correct interpretation of the law has shifted from the Trial Court to the trial attorney to the extent that unless the trial attorney anticipates possible error in a Court's charge, the contents of which are unknown to him before the charge is given, the trial attorney's exception to the error and request to correct the same is legally insufficient, although addressed precisely to the error, if not made in the precise language which the Circuit Court of Appeals feels should have been used in taking the exception. This is in conflict with the holding by the Supreme Court in the case of *Hauch v. Pope & Talbot, supra*, in the case of *Troupe v. Chicago, D. & G. Bay Transit Co., supra*, and other decisions cited in the *Troupe* case. Technical precise conformity with the Court's concept as to appropriate wording is now required, failing which, an erroneous charge and refusal by the Trial Court to correct such error by appropriate charge has been held as not reviewable by the Court below. This makes form and technicality and not substantive justice determinative, which is contrary to well established law, as is pointed out in *Blue v. United States Lines Company*, 286 F. 2d 920, and the many authorities therein cited on page 922.[3]

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318 U. S. 189, 280, 63 S. Ct. 549, 87 L. Ed. 704, vividly calls to mind the type of situation in which we would be favorably disposed to review alleged errors despite the failure of the appealing party to raise his objections below. * * *"

"10. Richmond, F. & P. R. Co. v. Brooks, 1952, 91 U. S. App. D. C. 24, 197 F. 2d 403, appears to hold that any alleged error in the charge on a significant aspect of the case will be considered on appeal despite failure to comply with Rule 51."

Hansel v. Bridgeman, 1941, 312 U. S. 552, 557, 61 S. Ct. 719, 85 L. Ed. 1037; *Troupe v. Chicago Duluth & Georgian Bay Transit Co.*, 2 Cir., 1956, 234 F. 2d 253; *Ehlert v. American Aviation and General Ins. Co.*, 3 Cir., 1954, 212 F. 2d 821, 824-825; *Massachusetts Bonding & Ins. Co. v. Ray Dilschneider, Inc.*, 8 Cir., 1953, 203 F. 2d 556, 568; *Smith v. Welch*, 10 Cir., 1951, 189 F. 2d 832, 836-837; *Dowell, Inc. v. Jeavons*, 5 Cir., 1948, 166 F. 2d 214, 2 A. L. R. 2d 442; *Shokuzan Shimabukuro v. Hiroyoshi Nagayama*, 1944, 78 U. S. App. D. C. 271, 140 F. 2d 13; 5 Moore, Federal Practice, Para. 5104, at 2503-04.

8. In conflict with the holding by this Court in *McAllister* v. *United States*, 348 U. S. 19, 75 S. Ct. 6, the Court below has itself made new findings of fact, not made by the Trial Court, and as to which findings there is no evidence in the record.

9. Dangers which heretofore had been recognized as constituting breach of warranty of seaworthiness and basis for imposing damages for breach of warranty of seaworthiness have been erroneously reclassified as no longer constituting a basis for recovery, by limiting such warranty exclusively to alienable dangers. Is it therefore correct to interpret a shipowner's duty as to warranty of seaworthiness, limited to preventable dangers (as specifically held in petitioner Hooper's case) or to inherent, as well as to alienable, unsafe seaboard conditions?

ARGUMENT

POINT I

There is an intra-circuit conflict which requires clarification and mandate by the Supreme Court of the United States.

The Supreme Court of the United States has in the past granted certiorari to bring about uniformity within the Circuit.

See:

John Hancock Ins. Co. v. *Bartels*, 308 U. S. 180, 60 S. Ct. 221;

Dickinson v. *Petroleum Conversion Corp.*, 338 U. S. 507, 70 S. Ct. 322.

As Mr. Justice Frankfurter has stated in his dissenting opinion in *Rogers* v. *Missouri Pacific R. R. Co.*, 352 U. S. 500, 530-531, 77 S. Ct. 443, certiorari jurisdiction is exercised on matters of general importance, "or in order to secure uniformity of decision."

POINT II

The decision by the Court below constitutes a radical departure from well established and uniform law.

The holding by the Court below that negligent causation, notice and lack of due care are elements to be proven in order to establish liability for injuries proximately caused by a dangerous shipboard condition, or to grant immunity from liability on the basis that the danger is inherent in the work, constitutes nullification of remedial rights to which seamen and men doing the work traditionally performed by seamen, are entitled as a matter of well established law.

The holding by the Court below constitutes a radical departure from uniform and well established law as expressed by the Supreme Court in the following cases:

Mitchell v. *Trawler Racer, Inc., supra* (362 U. S. 539, 80 S. Ct. 926);
Seas Shipping Co. Inc. v. *Sieracki* (1946), 328 U. S. 85, 66 S. Ct. 872;
Van Carpals v. *S.S. American Harrester* (2d Cir. Dec. 13, 1961);
Michalic v. *Cleveland Tanker, Inc.*, 364 U. S. 325, 81 S. Ct. 6;
Poignant v. *United States* (2d Cir.), 225 F. 2d 595;
Grillea v. *United States* (2d Cir.), 232 F. 2d 919;
The T. J. Hooper (2d Cir.), 60 F. 2d 737, cert. denied *Eastern Transportation Co.* v. *Northern Barge Corp.*, 287 U. S. 662, 53 S. Ct. 220;
Krey v. *United States* (2d Cir.), 123 F. 2d 1008;
Campbell v. *Tidewater Associated Oil Co.*, D. C. S. D. N. Y., 141 F. Supp. 431.

See:
La Guerra v. *Brasileiro* (January 8, 1942), 124 F. 2d 553, cert. denied 315 U. S. 824, 62 S. Ct. 918;
Amador v. *A/S J. Ludwig Mowinckels Rederi* (July 1, 1955), 224 F. 2d 437, cert. denied 350 U. S. 901, 76 S. Ct. 179;

Grillea v. *United States* (April 26, 1956) (rehearing denied), May 4, 1956, 2 Cir. 232 F. 2d 919; *Reddick* v. *McAllister Lighterage Line* (July 14, 1958) rehearing denied Aug. 5, 1958, 258 F. 2d 297, cert. denied 358 U. S. 908, 79 S. Ct. 235; *Rich* v. *Ellerman & Bucknall S.S. Co.* (May 12, 1960), 278 F. 2d 704.

The only case cited by the Trial Court as authority in the *Hooper* case, *supra*, for the decision, is misinterpreted[4]

The case of *Carabellese* v. *Naviera Aznar, S.A.*, 285 F. 2d 355 (2nd Cir. 1960), dealt with a stevedore negligently causing a piece of cargo to fall.

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[4] The *Dixon* case, *supra*, has been cited, with approval, innumerable times, and as recently as May 16, 1960 by the United States Supreme Court, in the case of *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 80 S. Ct. 926.

None of the Circuit Court opinions citing *Mitchell* and discussing the issue here involved adopt the position that considerations of "how long" are admissible in an action on unseaworthiness. *Arena* v. *Luckenbach Steamship Co.*, 279 F. 2d 186, 189 (1st Cir. 1960); *Calderola* v. *Cunard Steamship Co.*, 279 F. 2d 475, 477 (2nd Cir. 1960); *Puerto Segura Cia. Naviera, S.A.* v. *Petros Pitsillos*, 279 F. 2d 599, 600 (4th Cir. 1960); *Grzybowski* v. *Arrow Barge Co.*, 283 F. 2d 481, 485 (4th Cir. 1960); *Carabellese* v. *Naviera Aznar, S.A.*, 285 F. 2d 355, 359 (2nd Cir. 1960); *Morales* v. *City of Galveston*, 291 F. 2d 97 (5th Cir. 1961); *Knox* v. *United States Lines Co.*, 294 F. 2d 354, 1961 A. M. C. 1708, 1715 (3rd Cir. 1961).

In *Carabellese*, this Court stated "*Mitchell* * * * settles that a vessel cannot avoid liability for unseaworthiness merely because the owners have had no opportunity to remedy the unsafe conditions" (285 F. 2d at 359).

In the Circuit Court's opinion on remand in *Morales*, the majority opinion did not discuss the time element, essentially taking a position on the facts similar to that expressed by this Court in *Blier*. The vigorous dissent of Judge Rives asserted that time could not be a factor in determining unseaworthiness (291 F. 2d at 98-99).

For a persuasive District Court review of the issue, concluding that duration of condition cannot be a factor in an action on unseaworthiness, see Judge Hoffman's opinion in *Holley* v. *The Manfred Stansfield*, 186 F. Supp. 212, 215-216 (E. D. Va. 1960).

It is incomprehensible that the decision in the *Carabellese* case, *supra*, was so incorrectly interpreted in the face of the following language by Circuit Judge Friendly at page 359:

> "Since there was no evidence that the owner had known or could have known of the latent defect, this must have been designed to bring out that the crate had in effect become a part of the working surface supplied to the longshoreman, so that the owner would be liable for a latent defect in the crate as he would for one in the deck or even, as was held in Grillea v. United States, 2 Cir., 1956, 232 F. 2d 919, for a misplaced cover which the injured longshoreman had himself installed over part of a hatch. The same principle underlies Rich v. Ellerman & Bucknall S.S. Co., 2 Cir., 1960, 278 F. 2d 704. That, like the instant case, related to an injury sustained in loading, but the unseaworthiness lay in the stowage of truck chassis previously loaded which turned out to afford an unstable footing. Thus the chassis in Rich, like the crate in Reddick and the hatch cover in Grillea, had become, as was said in the Grillea case at p. 923, 'as much a part of the 'tweendeck for continued prosecution of the work, as though it had been permanently fixed in place.' ..."

Justice HARLAN, before his elevation to the United States Supreme Court, and while gracing the Bench of the United States Court of Appeals for the Second Circuit, in one of the most scholarly decisions ever written on the question of unseaworthiness, in the case of *Dixon* v. *United States*, 219 F. 2d 10, decided February 7, 1955, explained, in detail, the shipowner's duty to furnish a seaman with a safe place to work, tracing the law back to the case of *The Noddleburn*, D. C. D. Or. 1886, 28 F. 855.

Richter was required to ascend and descend from one level to another without a ladder and without anything whatsoever to hold onto in order to keep from slipping

and falling from a precarious perch, the only means available whereby to perform his duties.

Such physical conditions constitute unseaworthiness as well as undue exposure of a seaman to injury.

Judge Dawson, in the case of *Campbell* v. *Tidewater Associated Oil Co.*, 141 F. Supp. 431, held a shipowner liable under the following circumstances, stating at page 434:

> "Where a seaman is expected to ascend or descend from a structure which is 3' in height by the use of a narrow cleat attached to the side of the trunk and with no handhold or rail provided by which he can balance himself, the structure is itself not reasonably fit for the use for which it was intended. As the Court said in Schirm v. Dene Steam Shipping Co., D. C. E. D. N. Y. 1914, 222 F. 587:
>
> > 'If a ladder is set on such a substantial incline that, in order to maintain his equilibrium, the user is compelled to hold himself away from the ladder, then of course, he must have a hand-rail, or something else extending above the ladder, to hold on.' " 222 F. at page 589.

Judge Weinfeld, in the case of *Buch* v. *United States*, 122 F. Supp. 25, aff'd * 220 F. 2d 165, held that it was a breach of warranty of seaworthiness to expose a seaman to the need of traversing an area without the means " * * * to secure a firm foothold * * * " page 27.

Richter had neither a firm foothold nor handhold, but was compelled to perform his duties by climbing onto one metal shelf and holding on to another.

When Richter climbed the slippery steel shelf, standing on one and attempting to hold on to another, he was, obviously, in a precarious and dangerous position.

This danger was the proximate cause, or, at the very least, a substantially contributing factor in causing his fall and resultant injuries.

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* Affirmed except as to amount of maintenance damages.

Richter did not assume the risk of injury when using the only means available to perform his duties.[5]

As to the *Ezekiel* case, our Courts have consistently held a shipowner liable for the failure to provide a seaman with reasonably safe means wherewith to perform his duties.

The latest expression by the United States Supreme Court holding a shipowner liable for its failure to provide a safe and proper tool or appliance is set forth in the case of *Michalic* v. *Cleveland Tanker, Inc., supra.*[6]

As to the Pinto case.

In *Poignant* v. *United States*, 225 F. 2d 595 (2d Cir. 1955), five years before *Mitchell*, this Court held that unseaworthiness liability could arise as to conditions occurring after the onset of the voyage. In a concurring opinion, Judge Frank spelled out liability for a transitory slippery substance, quoting from and adopting Judge Bigg's dissent-

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[5] In the case of *Klimaszewski* v. *Pacific-Atlantic Steamship Co.*, 246 F. 2d 875, at page 877:

"As in Gindville, we say here that one need only refer back to Socony-Vacuum Oil Co. v. Smith, 1939, 305 U. S. 424, 59 St. Ct. 262, 83 L. Ed. 265, to get the rule with regard to the application of the doctrines of assumption of risk and contributory negligence in a maritime case. The extension of the rule stated in the Socony-Vacuum case to longshoremen is shown in Pope & Talbot, Inc. v. Hawn, 1953, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143, and the Gindville case, supra. The new decision of the Sixth Circuit in Imperial Oil, Ltd. v. Drlik, 234 F. 2d 4, certiorari denied, 1956, 352 U. S. 941, 77 S. Ct. 261, 1 L. Ed. 2d 236 is squarely in point * * *."

[6] *The Max Morris*, 137 U. S. 1, 34 L. ed. 586, 11 S. Ct. 29; *The Frank and Willie*, 45 F. 494; *The Julia Fowler*, 49 F. 277; *The Osceola*, 189 U. S. 158, 47 L. ed. 760, 23 S. Ct. 483; *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, 66 L. ed. 927, 42 S. Ct. 475; *Mahnich* v. *Southern S.S. Co.*, 321 U. S. 96, 88 L. ed. 561, 64 S. Ct. 455; *Cox* v. *Esso Shipping Co.*, 247 F. 2d 629; *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 4 L. ed. 2d 941, 80 S. Ct. 926.

ing words in *Cookingham* v. *United States*, 184 F. 2d 213, 216, cert. denied 340 U. S. 935, 71 S. Ct. 495 (3rd Cir. 1950):

> "If the stairway was in a condition dangerous for the use for which it was intended, however, 'transitorily,' it was unseaworthy. It remained so while the unsafe condition persisted. The element of time which has intruded itself in this case in both the opinion of this court and that of the court below is irrelevant under the doctrine of the shipowner's absolute liability." (225 F. 2d at 603)

That Judge Frank's concurring decision in *Poignant* was essentially adopted by the Supreme Court in *Mitchell* is clearly indicated in Mr. Justice Harlan's comments in his dissenting opinion in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. at 570-573, 80 S. Ct. 926, and by Judge Medina's reference in *Blier* v. *United States Lines Company*, 286 F. 2d 920, at 924 (2d Cir. 1961).

The composite view as to the correct interpretation of the warranty of seaworthiness was completely disregarded by the Court below, and constitutes a radical and complete departure from the mandate of the Supreme Court, as shown by comparison with the following excerpts treating with this subject:

Seas Shipping Co. v. *Sieracki*, *supra*.

(p. 876, 877):

> "Most often perhaps these have been limitations arising from the erroneous idea that the liability is founded in negligence and therefore may be defeated by the common-law defenses of contributory negligence, assumption of risk and the fellow servant rule. Mahnich v. Southern S.S. Co., supra; cf. Carlisle Packing Co. v. Sandanger, 259 U. S. 255, 42 S. Ct. 475, 66 L. Ed. 927."

* * *

"It is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. Mahnich v. Southern S.S. Co., supra; Atlantic Transport Co. of West Virginia v. Imbrovek, 234 U. S. 52, 34 S. Ct. 733, 58 L. Ed. 1208, 51 L. R. A., N. S., 1157; Carlisle Packing Co. v. Sandanger, supra. It is a form of absolute duty owing to all within the range of its humanitarian policy."

Cramady v. *The Joachim Hendrik Fisser*, (1959) 358 U. S. 423, 79 S. Ct. 445.

(p. 447, 488):

"And as to appliances the duty of the shipowner does not end with supplying them; he must keep them in order."

• • •

"It was held in Grillea v. United States, 2 Cir., 232 F. 2d 919, that stevedores themselves could render a ship pro tanto unseaworthy and make the vessel owner liable for injuries to one of them."

Mitchell v. *Trawler Racer, Inc., supra.*

(pp. 932, 933):

"The ship is not freed from liability by mere due diligence to render her seaworthy as may be the case under the Harter Act (46 U. S. C. A. §§ 190-195) where loss results from faults in navigation, but under the maritime law there is an absolute obligation to provide a seaworthy vessel and, in default thereof, liability follows for any injuries caused by breach of the obligation." 87 F. 2d at page 741."

• • •

"[3] From that day to this, the decisions of this Court have undeviatingly reflected an understanding that the owner's duty to furnish a seaworthy ship is absolute and completely independent of his

duty under the Jones Act to exercise reasonable care. Pope & Talbot, Inc. v. Hawn, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143; Alaska Steamship Co. v. Petterson, 347 U. S. 396, 74 S. Ct. 601, 98 L. Ed. 798; Rogers v. United States Lines, 347 U. S. 984, 74 S. Ct. 849, 98 L. Ed. 1120; Boudoin v. Lykes Bros. S.S. Co., 348 U. S. 336, 75 S. Ct. 382, 99 L. Ed. 354; Crumady v. The J. H. Fisser, 358 U. S. 423, 75 S. Ct. 382, 99 L. Ed. 354; United New York and New Jersey Sandy Hook Pilots Ass'n v. Halecki, 358 U. S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541. There is no suggestion in any of the decisions that the duty is less onerous with respect to an unseaworthy condition arising after the vessel leaves her home port, or that the duty is any less with respect to an unseaworthy condition which may be only temporary. Of particular relevance here is Alaska Steamship Co. v. Petterson, supra. In that case the Court affirmed a judgment holding the shipowner liable for injuries caused by defective equipment temporarily brought on board by an independent contractor over which the owner had no control. That decision is thus specific authority for the proposition that the shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability. That decision also effectively disposes of the suggestion that liability for a temporary unseaworthy condition is different from the liability that attaches when the condition is permanent."

Michalic v. *Cleveland Tankers, Inc., supra.*

(p. 9):

"The vessel's duty to furnish seamen with tools reasonably fit for their intended use is absolute, Mahnich v. Southern S.S. Co., 321 U. S. 96, 64 S. Ct. 455, 88 L. Ed. 561; Seas Shipping Co. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099; The Osceola, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760; Cox v. Esso Shipping Co., 5 Cir., 247 F. 2d 629."

Palazzolo v. *Pan-Atlantic S.S. Corp.* (2d Cir. 1954), 211 F. 2d 277, aff'd 349 U. S. 901, 75 S. Ct. 575, reh. gr. and vac. 349 U. S. 926, 75 S. Ct. 769, aff'd 350 U. S. 124, 76 S. Ct. 232.

"Since it is reasonably foreseeable that improper stowage must result in rolls of pulp sliding or 'jumping' and striking someone, the ship would be liable for this accident if the jury found, as it did here, that the accident resulted from improper stowage. La Guerra v. Brasileiro, 2 Cir., 124 F. 2d 553. Proper stowage is an element of seaworthiness. Pioneer Import Corp. v. The Lafcomo, 2 Cir., 138 F. 2d 907. There was ample evidence to support a jury verdict on either or both negligence or unseaworthiness."

Ryan Stevedor. Co. v. Pan-Atlantic Steam. Corp. (1956), 350 U. S. 124, 76 S. Ct. 232.

(pp. 237, 238):

"The Court of Appeals has stated that the liability of petitioner in this case is for the performance of its obligation to stow the rolls on board ship 'in a reasonably safe manner.' 211 F. 2d at page 279. That court also has affirmed the decision of the District Court which was based upon the verdict of the jury that petitioner's improper stowage of the rolls produced either the unseaworthiness of the ship, or the hazardous working condition which is the basis for the shipowner's liability to Palazzolo."

Cox v. Esso Shipping Company (5th Cir. 1957), 247 F. 2d 629.

(p. 636):

"This is true even in a claim for unseaworthiness as 'The right is in the nature of liability without fault for which contributory negligence is not a bar to recovery, although it may be relevant in assessing the damages * * *.' concurring opinion of Mr. Justice Frankfurter Pope & Talbot, Inc. v. Hawn, 346 U. S. 406, at page 415, 74 S. Ct. 202, at page 208, 98 L. Ed. 143, at page 154, 1954 A. M. C. 1, at page 11. But the failure of the shipowner to comply with its heavy obligation to select and furnish

seaworthy appliances cannot be thus turned into a fault by the seaman."

Troupe v. *Chicago, D. & G. Bay Transit Co.* (1956), 234 F. 2d 253.

(pp. 259, 261):

"A point is properly preserved when a party has made known his objection to the trial court and stated the grounds on which he bases his objection. Keen v. Overseas Tankship Corp., supra; Irvin Jacobs & Co. v. Fidelity & Deposit Co. of Maryland, 7 Cir., 1953, 202 F. 2d 794, 800-801, 37 A. L. R. 2d 889."

* * *

(Concurring opinion, Judge Frank):

"My colleagues concede that, in an exceptional case, we may review errors not 'saved' by a proper objection. They suggest this is not an exceptional case, relying on a statement in United States v. Atkinson, 297 U. S. 157, 160, 56 S. Ct. 391, 392, 80 L. Ed. 555. There the Supreme Court, set forth, in the disjunctive, two grounds for reviewing such errors:

(1) 'the errors are obvious

or

(2) they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.'

My colleagues stress the second ground. But the first ground alone suffices, as the cases make clear. And here, as observed above, the error was magnificently obvious. A litigant surely has the right to assume that a federal trial judge knows the elementary substantive legal rules, long established by the precedents, and that therefore the judge will act

accordingly, without prompting by the litigant's lawyer.[3]"

See footnote "2".

Mere availability of goggles does not meet an employer's obligation of safety to an employee chipping rust and paint under circumstances which but for the use of goggles subjects the employee's eyes to serious injury and possible blindness, as pointed out by the Court of Claims in the case of *Gould* v. *State*, 92 N. Y. S. 2d 251, and authorities therein cited.

Circuit Judge Clark, in his dissenting opinion in *Ezekiel*, *supra*, stated, in part, as follows:

> "These principles control this case. I can see no functional difference between the goggles here and the shield in the hypothetical situation. A dangerous condition was created by the fact that a necessary safety appliance was not employed. There is no dispute that the injury would not have occurred had Ezekiel been wearing goggles. Since he did not use them, the further question whether the goggles were 'reasonably fit for their intended use' does not arise. Goggles were necessary if rust was to be chipped safely; thus the duty to see that they were used was absolute."

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[3] "Because, usually the lawyers alas do not have in hand the judge's charge in writing before he delivers it, they may overlook errors in the charge, until they receive a transcript after the trial is over. This may be especially true if the charge contains an error concerning elementary legal principles which lawyers reasonably assume the judge did not overlook.

Although it is not necessary to sustain my position, I note that particularly here was plaintiff entitled to assume that the judge would pay attention to the legally obvious, since she is a "ward of admiralty", to the protection of whose interests he should have given unusual care."

POINT III

The decision by the Court below is contrary to the clear mandate of the Supreme Court.

That the fact that the decisions by the Court below constitute adoption of minority view as controlling is clearly demonstrated by Judge Clark in his dissenting opinion, concurred in by Judge Smith, in the *per curiam* decision in the petition for a rehearing in *banc* in the *Pinto* case.

The decision by the Court below is in conflict with all prior decisions treating with the question of seaworthiness, the latest two being as follows:

> *Edna Fall, as Admrx of the Estate of Philip Fall* v. *Esso Standard Oil Company* (5th Cir.), decided December 13, 1961, No. 18578 (not officially reported as yet);
>
> *Massa* v. *C. A. Venezuelan Navigacion, etc.* (2nd Cir.), decided January 15, 1962, No. 27059 (not officially reported as yet).

In the *Massa* case, *supra*, decision by Circuit Judges Waterman, Smith and Marshall, the Court stated:

> "The doctrine of unseaworthiness imposes upon a ship owner an absolute duty to furnish a vessel and appurtenances thereto reasonably fit for their intended use. Mitchell v. Trawler Racer, Inc., 362 U. S. 539 (1960). The fact that the stevedoring firm may have supplied the defective appurtenance, here the pallet, does not absolve the vessel owner from liability under the doctrine. Petterson v. Alaska S.S. Co., 205 F. 2d 478 (9 Cir. 1953), aff'd per curiam 347 U. S. 396 (1954); Reed v. The Yaka, 183 F. Supp. 69 (E. D. Pa. 1960). Nor is the fact that the injury occurred on shore a bar to recovery so long as the requisite maritime 'status' or 'relation' is present.

Strike v. Netherlands Ministry of Trade, 182 F. 2d 555 (2 Cir. 1950), cert. denied 341 U. S. 904 (1951); Litwinowicz v. Weyerhaeuser Steamship Co., 179 F. Supp. 812 (E. D. Pa. 1959)."

POINT IV

The Supreme Court's repeated admonitions that "the duty to provide a seaworthy ship—" have been evaded by the alchemy of word transmutation.

Implicit within, and expressed by, all Supreme Court decisions in point, is the clear instruction that no distinction shall be made, based on time, circumstances or causation of an unsafe place to work, aboard ships in navigation.

No lexiphonic or grandiloquent language constitutes a substitute for a shipowner's duty to provide his crew and longshoremen with a reasonably safe place to work. The expediency of giving descriptive names to existing dangers in nowise changes the true facts.

A ship is either seaworthy or not.

Words are but mere sound, whereas seaworthiness is a realistic requirement on which rests the lives and safety of all persons working in maritime service as a means of earning a living.

POINT V

Erroneous and unauthorized judicial legislation by the court below is such as to merit review by the Supreme Court for correction.

The duty to provide a seaworthy vessel has been so modified by the court below that, hereafter, by labelling an unseaworthy condition as a danger inherent, inborn, infixed,

inalienable, intrinsic or other word, such renaming of the unseaworthy condition would be a complete defense for the breach of the warranty of seaworthiness.

This is in direct conflict with the holdings of all prior decisions.

POINT VI.

A new burden of proof has erroneously been established by the court below.

Proof of preventive, separable or alienable nature of unseaworthiness is now required of the accident victim, as further burden of proof, never required heretofore, that is if the holding by the court below, in petitioner Hooper's case, is to be considered good law.

POINT VII.

The court below erroneously made findings of fact in a manner which is in direct conflict with the holding by this Court in the case of *McAllister* v. *United States, supra.*

The trial court in the *Hooper* case herein did not make a finding of "inherent danger".

The uncontradicted evidence was that the manner of affixing the cargo chains, when the cargo was originally loaded, caused a buckling of the deck lumber and created spaces between many piles of lumber. The proof was that these conditions *created* the proximate danger which caused the footing, on which Hooper was working, to suddenly shift and throw him overboard (fol. 231, Hooper Record).

The labelling of such unsafe conditions as "inherent danger" and therefore not unseaworthy, does violence to the true meaning of words in common usage and merits review for correction by the Supreme Court.

Conclusion

Unless further clarification and instruction is given by the Supreme Court, a shipowner's duty, to the crew members on board ship, of providing a reasonable safe place to work, is rendered ineffectual.

The inroads and modification of the duty, if permitted to stand, would invite further dilution, if not complete nullification, of such duty, as exemplified by the following:

1. In the case of petitioner Pinto, by holding that because proof that the condition of the grease, on the narrow stairway, did not show a sufficient length of time to give the shipowner notice of the dangerous condition, the unsafe condition was not unseaworthiness.

2. In the case of petitioner Hooper, he was denied recovery notwithstanding proof that the concededly unsafe place to work, proximately caused his injury, by changing of the condition "unseaworthiness" to the words, "inherent danger".

3. In the case of petitioner Ezekiel, on the holding that the shipowner had exercised due care in providing goggles, concededly none of which were in use by Ezekiel at the time. A foreign particle entered his eye and blinded him while he was chipping rust aboard ship.

4. In the case of petitioner Richter, the absence of a ladder and the need for Richter to stand on a shelf in a narrow closet aboard ship to reach supplies, was held to be a danger assumed by Richter and, therefore, the shipowner was not guilty of breach of warranty of seaworthiness.

Petitioners pray that a writ of certiorari be granted to protect their rights, which have been held by this Supreme Court to be the rights of all crew members and longshoremen engaged in maritime service aboard ships in naviga-

tion. Rights heretofore had by crew members and longshoremen, have been denied all petitioners herein. Rights, as far as all other seamen and longshoremen are concerned, are now in jeopardy of complete nullification unless protected by the granting of the petition for the writ of certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioners.

APPENDIX

Opinions of United States Court of Appeals for the Second Circuit

No. 11—September Term, 1961.

(Petition for rehearing *in banc* submitted November 9, 1961
Decided November 28, 1961.)

Docket No. 26317

RAUL PINTO,
Plaintiff-Appellant,

v.

STATES MARINE CORPORATION OF DELAWARE,
Defendant-Appellee.

Before:

LUMBARD, *Chief Judge*,

CLARK, WATERMAN, MOORE, FRIENDLY, SMITH, KAUFMAN, HAYS and MARSHALL, *Circuit Judges*.

HENRY ISAACSON, New York, N. Y. (Jacob Rassner and Theodore H. Friedman, on the brief), *for plaintiff-appellant*.

PER CURIAM:

The petition for rehearing *in banc* is denied.

CLARK, *Circuit Judge* (dissenting):

Judge Smith's compelling dissent points up a developing problem stemming from discontent with the Supreme Court's expansion of the concept of *unseaworthiness* on the part of those brethren who find themselves in greater sympathy with the views of the dissenters than those of the majority in the quite similar case of *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539. I suggest that a reading of the opinions there, particularly the dissenting opinions, against the opinions herein, will support this conclusion. And the problem is bound to recur often in view of the large number of these cases coming before each panel of our court. The intellectual reaction is understandable, since the minority view was powerfully presented. But whatever we may feel as to the merits of the debate, our duty is surely to apply the presently prevailing law and leave the question of further change to the Court itself. Furthermore, the Court's manifest intent to safeguard human lives at sea and to enforce the shipowner's responsibility by strict liability is not one to combat. But the trend here illustrated toward divergent precedents will make decision increasingly embarrassing for us.

I realize that the *in banc* device represents at best a temporary palliative, rather than the permanent corrective which can be supplied only by the Court itself. But there are now too many cases to expect the Court to act in all these private claims in view of its pressing public obligations. And in our recent past we have employed the *in banc* device to correct decisions not accepted by a majority; indeed, among our inconsistent appearing decisions thereto, the one and only thread, quite obviously, has been its use as such a corrective. Failure to resort to it here to resolve a really troublesome division of view I do think ought to have one advantage, namely in freeing us from the bondage of supporting decisions in which we do not believe. I have always believed that judges must have and do have a mod-

erate degree of freedom in this regard, see, e.g., *Dunbar* v. *Henry Du Bois' Sons Co.*, 2 Cir., 275 F. 2d 304, 306, certiorari denied *Henry Du Bois' Sons Co.* v. *Dunbar*, 364 U. S. 815, though this view seems to have engendered a certain amount of criticism. *Chabot* v. *National Securities and Research Corp.*, 2 Cir., 290 F. 2d 657, 659; Friendly, 109 U. of Pa. L. Rev. 1040, 1045 (1961). Surely we cannot be expected to go contrary to what we believe to be the clear mandate of the Supreme Court by reason of a panel precedent which we thus appear to be powerless to change or modify. But as the more immediate way out of our present self-created dilemma I would vote for deliberation by the entire court.

Judge Smith concurs in this dissent.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 11—September Term, 1961

(Argued September 26, 1961 Decided October 26, 1961)

Docket No. 26317

RAUL PINTO,

Plaintiff-Appellant,

v.

STATES MARINE CORPORATION OF DELAWARE,

Defendant-Appellee.

Before:

LUMBARD, *Chief Judge*,
FRIENDLY and SMITH, *Circuit Judges*.

Appeal by plaintiff seaman from a judgment for defendant, after jury verdict, in the District Court for the Southern District of New York, EDWARD WEINFELD, *Judge*. Affirmed.

THEODORE H. FRIEDMAN (HENRY ISAACSON) (JACOB RASSNER, of counsel; THEODORE H. FRIEDMAN, on brief), New York, New York, for Appellant.

CORYDON B. DUNHAM, New York, New York, for Defendant-Appellee.

FRIENDLY, *Circuit Judge*:

As in *Blier* v. *United States Lines Company*, 286 F. 2d 920 (2 Cir. 1961), cert. denied, — U. S. — (1961), the prin-

cipal issue here is whether the charge of an able District Judge with respect to "transitory" unseaworthiness, given shortly before the decision in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539 (1960), accords with the principles there stated by the Supreme Court. Although the question may be closer than in *Blier*, where we sustained Judge Dimock's charge, we find no sufficient basis for distinguishing that decision or, indeed, for coming to any different conclusion apart from it.

Pinto was a seaman aboard the SS. Clovis Victory, a government owned vessel which defendant operated. While the ship was at sea, the third mate directed Pinto and a helper, Fantroy, to carry a heavy signal light from the wheel-house to the engine room for repairs. In descending the ladder leading into the engine room, Pinto slipped and fell, allegedly sustaining a serious injury to his back. The action, in which Federal jurisdiction was predicated upon the Jones Act, 46 U. S. C. § 688, was brought on the "law" side, with a jury trial demanded.

The case was submitted to the jury solely on the basis of unseaworthiness, a claim of negligence having been withdrawn by the plaintiff. The jury found for defendant, and judgment was entered accordingly. Only two of the three theories of unseaworthiness advanced below require consideration here[1]—"operating" unseaworthiness, in that some other method should have been adopted for conveying the light to the engine room, and unseaworthiness based on the alleged presence of grease or oil on the step of the ladder where Pinto slipped. Plaintiff claims error in the charge as to both; we find it in neither.

(1) The judge characterized plaintiff's claim of operating unseaworthiness as going "to the competency of the

[1] The third was that the step on which Pinto fell was worn and slick; no complaint is made with respect to the charge on that score and the fact thus must be taken as established for the defendant by the verdict.

third mate in issuing the instructions to plaintiff and Fantroy to carry the blinker light down the particular stairway and in failing to supervise their activity." He reviewed the testimony of plaintiff's expert "that good seamanship required" that if Pinto and Fantroy were to carry the blinker light down the ladder, "they should have been under the direct supervision of a superior officer," but that in fact "it was unsafe to take anything down as heavy as the light without the aid of a block and fall." He then summarized defendant's evidence that the method was perfectly proper, that indeed "the third mate applied an excess of caution" in supplying a helper, and that the light "well could have been carried down by the plaintiff himself, just as the mate had done earlier." After noting what might seem the anomaly that "this conflict as to an approved and accepted method of carrying the blinker light" should be left to a jury of laymen to resolve, he then made the only remark now criticized:

> "But actually, you are called upon to decide if the third mate was equal in seamanship to the ordinary men of his calling."

Plaintiff claims this to be error since, as he contends, the issue was not the seamanship of the third mate in general but the propriety of the work procedure directed here. There are several answers. The first is that the quoted sentence may not permissibly be taken in isolation; considering the charge as a whole, the jury must have understood that it was to determine the very issue that plaintiff says it should have been allowed to determine. That would be our interpretation even if the portion of the charge concluding in the sentence under attack stood alone; it is still more so in the light of the judge's earlier characterization of Pinto's claim as being "That the third mate was incompetent, in that he should not have instructed or permitted" two men to carry the lamp but should have super-

vised their activity and that "good seamanship dictated" use of a block and tackle—"In short, that the third mate failed to measure up to the standard of his calling, and hence the vessel was unseaworthy." Second, if plaintiff's counsel thought the jury might apply the remark now criticized in a manner different from what he believed proper, it was his duty to call the point to the judge's attention; this he did not do. Finally, the charge which plaintiff asserts should have been and, in our view, was given, was more favorable than the law warrants. Gilmore and Black, The Law of Admiralty (1957), 320, say that "The only case which is today clearly outside the scope of the unseaworthiness doctrine is [ ] an injury whose only cause is an order improvidently given by a concededly competent officer on a ship admitted to be in all respects seaworthy," citing *The Osceola*, 189 U. S. 158 (1903), *Chelentis* v. *Luckenbach SS. Co.*, 247 U. S. 372 (1918), and *Imperial Oil, Ltd.* v. *Drlik*, 234 F. 2d 4 (6th Cir. 1956). Here, of course, the ship was not "admitted to be in all respects seaworthy," but if the other claims of unseaworthiness were determined in favor of the defendant on proper instructions, the same result must follow. On that view, plaintiff, under his claim of "operating" unseaworthiness, was entitled to raise only the mate's overall competence; to the extent that the judge went beyond that, as we think he did, it was the defendant who was entitled to complain.

(2) The evidence whether there was grease or oil on the step was in sharp conflict. The Chief Engineer had found none, either at 1:15 P. M., some forty-five minutes before the accident, or immediately thereafter. The First Assistant Engineer testified that the ladder was constructed of grating, for the precise purpose of keeping any accumulation of oil to a minimum; that the steps had been thoroughly cleaned shortly before noon; and that on an inspection right after the accident, he had found no oil or grease. The Chief Mate, who inspected the ladder a half hour after

Pinto's fall, found "the step was absolutely dry"; [2] he had never seen a film of oil on the stairway though he had visited the engine room once or twice daily. As against this, Pinto insisted that he had noticed grease on the step after the injury, and Fantroy corroborated this.

After reviewing the evidence the judge charged as follows:

> "Unseaworthiness is a relative concept, dependent in each instance upon the circumstances in which the ship's fitness is drawn in question. In deciding this issue you will of course bear in mind that the accident occurred on the ladder leading to and from the engine room, where the use of oil and grease is required for normal engine room functioning. In this circumstance, the mere momentary presence of oil in the area does not in and of itself render the vessel unseaworthy. Before you can find that the vessel was unseaworthy plaintiff must satisfy you by a fair preponderance of the evidence that the alleged condition of oil or grease, which he claims caused him to slip, was not a momentary phase in the normal progress of work in and about the engine room, but that oil and grease was permitted to accumulate in sufficient quantity so that the vessel was rendered unseaworthy. In other words, it is not required that the vessel have a crew member handy with a rag to wipe off oil the very minute it is placed in an area. A vessel does not become unseaworthy by reason of a temporary condition caused by a transient substance if even so the vessel was as fit for service as similar vessels in similar service. The essential test is whether, considering place and circumstance, the area was reasonably fit to permit

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[2] The Third Assistant Engineer testified that no one had wiped anything from the steps before the inspection.

> Pinto to perform his tasks with reasonable safety. Absolute perfection is not required under the doctrine of seaworthiness. It requires reasonable fitness for intended use."

Plaintiff's counsel excepted on the basis that the judge had charged "in line with the Cookingham decision, that a transitory condition would not impose liability," whereas in fact "whether it was transitory or not wouldn't make any difference on a charge of unseaworthiness."[3]

The judge's statement that "A vessel does not become unseaworthy by reason of a temporary condition caused by a transient substance if even so the vessel was as fit for service as similar vessels in similar service" and the sentences continuing to the end of this portion of the charge are substantially equivalent to what we sustained in *Blier v. United States Lines Company, supra.* If a different result is to be reached here, it must be on the basis of the judge's earlier statement that "the mere momentary presence of oil in the area [the engine room] does not in and of itself render the vessel unseaworthy" and the two sentences immediately following. To use these are no more than a permissible application of the later general statements to

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[3] At the same time oral request was made for a charge "that if the physical condition as it existed at that precise time was not reasonably safe for carrying down a particular blinker light, then they should not be concerned with whether or not the condition was created just a few minutes before or a long time before." The Court declined to grant this "for the reason that counsel were asked to submit requests for instructions under the rules and no such request was submitted." This was proper; the judge is entitled to an opportunity to study written requests in advance of his own charge and ought not be obliged to act on oral ones after his charge has been given. F. R. Civ. Proc. 51; *Dallas Ry. & Terminal Co. v. Sullivan*, 108 F. 2d 581, 584 (5 Cir. 1940); *Secraty v. Philadelphia Coca-Cola Bottling Co.*, 198 F. 2d 264 (3 Cir. 1952); *Tuener Construction Co. v. Houlihan*, 240 F. 2d 435 (1 Cir. 1957). Moreover, the request went too far, for reasons later pointed out.

the particular facts. The charge seems to be good sense, and we are not persuaded that *Mitchell* makes it bad law,—especially when the judge followed the remarks now criticized by saying that "The essential test" was almost precisely what Mr. Justice Stewart was to say two months later, 362 U. S. at 550.

In *Mitchell* the judge had told the jury that unseaworthiness is "quite similar to negligence" and summed up, 362 U. S. at 540-541, fn. 2:

> "Was there something there and was it there for a reasonably long period of time so that a shipowner ought to have seen that it was removed? That is the question."

The jury could well have regarded that question as containing negligence connotations, and the liklihood that they were intended to do exactly that was emphasized by the refusal of a request "to instruct the jury that notice was not a necessary element in proving liability based upon unseaworthiness of the vessel," 362 U. S. at 541. Indeed, the judge himself later described his charge as having been "that the plaintiff could not recover unless the slime had been on the rail long enough for the shipowner to be chargeable with knowledge of it,"—an instruction which, on reflection, he considered to be possibly "inappropriate with respect to the unseaworthiness count" save for special circumstances as to who had been responsible for the slime getting on the rail, 167 F. Supp. 434 (D. Mass. 1958).[4] The Court of Appeals, characterizing the charge "as requiring proof of the presence of the unseaworthy condition for a sufficient length of time, from which the inference might be drawn that defendant, or his servants, in the exercise of due

[4] The Supreme Court rejected this justification as having "played no part in the issues developed at the trial." 362 U. S. at 542-543, fn. 4.

care, ought to have discovered the presence of the slimy substance and removed it," approved it on the very basis as to which Judge Wyzanski had become doubtful, namely, that in the case of "an unseaworthy condition which arises only during the progress of the voyage . . ." the shipowner's obligation is merely to see that reasonable care is used under the circumstances . . . by him . . . incident to the correction of the newly arisen defect." 265 F. 2d 426, 427, 432 (1 Cir. 1959). This was the posture in which the case was presented to the Supreme Court.

The Supreme Court thus regarded the case as presenting "the single issue whether with respect to so-called 'transitory' unseaworthiness the shipowner's liability is limited by concepts of common law negligence." 362 U. S. at 542. The context, as well as the term "so called," makes it plain that the Court was using "transitory," not in a general sense, but in the special one of what the Court of Appeals had called "an unseaworthy condition which arises only during the progress of the voyage," 362 U. S. at 542, whether of short or long duration, as distinguished from a condition existing at the voyage's inception. That "single issue," previously much debated in the Court of Appeals, see 362 U. S. at 542, the Supreme Court settled in the negative. However, in giving a negative answer to the question thus posed and enunciating "a complete divorcement of unseaworthiness liability from concepts of negligence," 362 U. S. at 550, the Court was at pains to make clear that it was not going to the extreme of requiring any such absolute freedom of all parts of a vessel from all foreign substances at all times, as, for example, Interstate Commerce Commission Rule 43 under the Boiler Inspection Act, 45 U. S. C. § 23, has been held to demand with respect to locomotives and tenders. *Lilly v. Grand Trunk Western R.R.*, 317 U. S. 481, 487-488 (1943); *Calabritto v. New York, N. H. & H. R.R.*, 287 F. 2d 294 (2 Cir.), cert. denied, 366 U. S. 928 (1961). When Mr. Justice Stewart

said, as to a vessel whose rail was claimed to have been coated with slime and fish gurry, "* * * the owner is not obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use." 362 U. S. at 550, and remanded the case "for a new trial on the issue of unseaworthiness," we do not think he meant that the mere presence of the slime and gurry, surely as much of a hazard as the alleged oil or grease here, would automatically lead to liability. If the Supreme Court had intended that the only issue to be open on remand was the presence or absence of the slime and gurry, that would have been easy to say.

The Court's decision that it was inconsequential, as a matter of law, that the dangerous condition did not arrive until a moment after the sailing did not logically carry with it a conclusion that it was similarly inconsequential, as a matter of fact, that the condition arose only a moment before the accident: whether such a momentary condition would or would not render the vessel unseaworthy would be for the trier of the facts to say. The statement at p. 550, that *Alaska Steamship Co. v. Petterson*, 347 U. S. 396 (1954), "also effectively disposes of the suggestion that liability for a temporary unseaworthy condition is different from the liability that attaches when the condition is permanent" must be read along with the immediately preceding one that the *Alaska Steamship* "decision is thus specific authority for the proposition that the shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability." A conclusion that liability for a temporary condition is not different in legal nature from liability for a permanent one does not mean that the duration of the condition, the measures prescribed for dealing with it, and the feasibility of achieving perfect safety at all times, are irrelevant to deciding whether the owner had met his obligation to furnish "a vessel reasonably suit-

able for her intended service." 362 U. S. at 550. *Poignant v. United States*, 225 F. 2d 595 (2 Cir. 1955), cited with approval in *Mitchell*, 362 U. S. at 550, n. 12, see also p. 542, had said that a vessel "does not become unseaworthy by reason of a temporary condition caused by a transient substance if even so the vessel was as fit for service as similar vessels in similar service," p. 598, and even Judge Frank's concurring opinion conceded, p. 602, "that, if defendant were to prove that there were no means, reasonably available, to keep the passageway free of garbage, the existence of the dangerous condition would not have constituted unseaworthiness."

As indicated in *Isbor v. United States Lines Company*, *supra*, at 923, we thus read *Mitchell* as holding that the trier of the facts is to determine whether the emergence and temporary continuance of a slippery or other hazardous condition does or does not leave a vessel "reasonably suitable for her intended service," 362 U. S. at 550, on the evidence in the case and under the standards of the trade; if that question is answered in the negative, it is then no defense either that the condition had come into existence only during the voyage or, if it had, that it had not existed "for a sufficient length of time, from which the inference might be drawn that defendant, or his servants, in the exercise of due care, ought to have discovered" its presence, 265 F. 2d at 427.

If our understanding of *Mitchell* is correct, Judge Weinfeld's charge conformed to it. The charge cannot fairly be read as importing notions of common-law negligence into the jury's determination of unseaworthiness. Earlier the judge had instructed that "even the exercise of diligence or reasonable care does not relieve the shipowner of the duty to supply a seaworthy vessel"; although "the standard to be applied is not absolute perfection, but only reasonable fitness for intended use." His remarks about the special nature of an engine room, and the lack of any requirement that the vessel have a crew member in constant

readiness to wipe off the most minute accumulation of oil were designed to clarify the meaning of this standard as applied to the case in hand. Nowhere did he suggest that plaintiff must prove that defendant's supervisory personnel knew or ought to have known that oil or grease had accumulated.[5] He left it to the jury to determine "whether, considering place", to wit an engine room, "and circumstances", that is, the evidence as to the special design of the steps "to prevent the accumulation of foreign substances", the practice of cleaning the steps, and the absence of oil or grease shortly before the accident, "the area was reasonably fit to permit Pinto to perform his tasks with reasonable safety."[6] If it be said that a jury inexpert in the ways of engine rooms cannot be expected to determine how much oil, if any, can be tolerated on a step and for how long, without the ship becoming unseaworthy thereby, we answer, much as Judge Medina did in *Blier v. United States Lines Company, supra*, at 926, that this is the kind of thing juries determine all the time. True, the task would be simpler if the jury had only to decide whether a foreign substance was present, but, as we read *Mitchell*, that is not the standard laid down by the Supreme Court.

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[5] In fact, there was no evidence as to when the grease alleged to have been on the ladder had gotten there. Pinto and Fantroy did not know, and defendant's witnesses denied there was any.

[6] The charge differed essentially from that disapproved in *Grzybowski v. Arrow Barge Co.*, 283 F. 2d 481 (4 Cir. 1960), distinguished in *Blier v. United States Lines Company, supra*, at 926, where the judge had instructed the jury to consider the absence of previous complaint by the plaintiff or request for corrective action by the ship; we agree with the decision on that basis, although the opinion contains some language with which we do not. Similarly the decision in *Puerto Seguro Cia. Naviera, S. A. v. Pitsillos*, 279 F. 2d 599 (4 Cir. 1960), is not opposed to our view of *Mitchell*, although certain of the language is; the Court of Appeals simply sustained a permissible finding of unseaworthiness by a judge as trier of the facts.

Moreover, if the charge were subject to any criticism, we doubt whether the exception was apt to raise it. More specific objection was needed to raise a contention that it was an invasion of the jury's province for the judge to state that the vessel need not "have a crew member handy with a rag to wipe off oil the very minute it is placed in the area", etc.; a contention with which we do not agree. The exceptions that were made were not well taken. The judge had not charged in line with *Cookingham*, 184 F. 2d 213 (3 Cir. 1950), cert. denied, 340 U. S. 935 (1951), as counsel claimed, but with this Court's decision in *Poignant*, 225 F. 2d at 597-598, which had disapproved *Cookingham*, as so experienced a judge well knew. Neither was there foundation for the accusation that the judge said "a transitory condition would not impose liability", whereas "whether it was transitory or not wouldn't make any difference on a charge of unseaworthiness." Insofar as this meant "transitory" in the technical sense of "post-inception", the charge had been just the opposite of that claimed; and if the more general sense of "momentary" was meant, the judge had said, quite correctly on our reading of *Mitchell*, that a momentary condition would not impose liability automatically and that the jury was to take the duration of the condition and the feasibility of more complete prevention into whatever account it found appropriate. The same considerations show that counsel's improperly submitted oral request was, on its merits, too broad.

Complaint is also made with respect to certain interrogation with respect to plaintiff's sex activities; this was not improper in the light of statements in the hospital record that had been received in evidence at plaintiff's instance.

Affirmed.

SMITH, *Circuit Judge* (dissenting):

I respectfully dissent, and would reverse on the ground that the charge did not fully anticipate the later *Mitchell* definition of the extent of the duty to provide a seaworthy ship. The charge here has not applied the same standards to a temporary condition as to a permanent one.

In *Blier* v. *United States Lines Company*, 286 F. 2d 920 (2 Cir. 1961), cert. denied — U. S. — (1961), there was, to be sure, mention of a temporary condition, but no indication that the test of seaworthiness was different from that for a permanent condition. Here, the charge makes a distinction absolving the shipowner from liability "if a momentary phase in the normal progress of work", and holds that "it is not required to have a crew member handy with a rag to wipe off oil the very minute it is placed in an area." This seems to me to import a time element into the concept of seaworthiness which time element was rejected by the Supreme Court in *Mitchell* v. *Trawler Racer, Inc.* (1960), 362 U. S. 539. If grease was on this step in a quantity sufficient to make it unfit for use by plaintiff, and he was injured thereby, the damage suffered falls under the *Mitchell* doctrine upon the ship, not the seaman. It makes no difference whether the grease was there seconds or hours, for the liability is imposed because the ladder was unfit for use, regardless of fault, as a means of distributing the risks of the calling. See Harlan, *J.*, dissenting in *Mitchell*, 362 U. S. 539 at 572.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 11—September Term, 1961.

Docket No. 26317.

RAUL PINTO,

Plaintiff-Appellant,

v.

STATES MARINE CORPORATION OF DELAWARE,

Defendant-Appellee.

Before:

LUMBARD, *Chief Judge*, FRIENDLY and SMITH, *Circuit Judges*.

ORDER MODIFYING OPINION

It is ordered, of the Court's own motion, that the opinion herein filed October 26, 1961, be modified by making the following changes on p. 39 of the slip opinion:

Lines 9-11—Strike out from "When" through "gurry", and substitute "The Court said,"

Line 15—Substitute a period for the comma at the end of the quote and strike out from there to the end of the paragraph.

Then insert:

> What was the question the jury was to try on the remand? Clearly it was not the mere presence or absence of slime and gurry on the rail—if the Supreme Court had meant that, it would have said so. Appellant urges it was whether slime and gurry

were present and their presence rendered the ship unseaworthy. In one sense that is so; but what was the jury to consider in answering the latter half of the question? Most jurors would see a difference in the seaworthy condition of a vessel whose rails had been left coated with slime and gurry for hours, and of another, generally spick-and-span, on which a mishap had suddenly created a slippery condition. Must they be told that this distinction, relevant in common sense, is irrelevant in law? So here, assuming the engine room steps were so constructed as to keep the hazard of oil accumulation to a minimum, most jurors would see a difference in seaworthiness as between a vessel whose well-constructed steps bore the oil accumulation of days and another whose similar steps had only a film of oil unavoidably accumulated since a cleaning a few hours before. We read Mitchell as saying they may nevertheless hold the owner liable in the latter case, not that they must. What Mitchell did forbid was the Court's instructing them to make any distinction based on whether the condition had or had not arisen until the voyage commenced, or on whether it had or had not been brought home to the owner. The duty may be no "less with respect to an unseaworthy condition which may be only temporary", 362 U. S. at 549, but the question remains whether such a temporary condition in fact renders the vessel "not reasonably suitable for her intended service", 362 U. S. at 550.

In the second line of the following paragraph change "arrive" to "arise".

J. E. L.,
U. S. Chief Judge.
H. J. F.,
U. S. C. JJ.

1 November 1961.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 63—September Term, 1961

(Argued November 8, 1961 Decided November 24, 1961)

Docket No. 27003

—o—

GEORGE HOOPER,

Plaintiff-Appellant,

against

TERMINAL STEAMSHIP COMPANY,

Defendant-Appellee.

—o—

Before:

LUMBARD, *Chief Judge*,
MEDINA and WATERMAN, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the Southern District of New York, David N. Edelstein, *Judge*.

Plaintiff, a longshoreman, appeals from a judgment dismissing his complaint on findings of lack of proof of negligence by the shipowner and lack of proof of unseaworthiness of the vessel, after a non-jury trial, in an action to recover damages for injuries sustained when the cargo of lumber on which he was standing shifted and he lost his balance and fell overboard. Opinion below not reported. Affirmed.

THEODORE H. FRIEDMAN, New York, N. Y. (JACOB RASSNER, New York, N. Y. on the brief), for plaintiff-appellant.

ROBERT M. PELLEGRINO, New York, N. Y. (DOUGHERTY, RYAN, MAHONEY & PELLEGRINO and ALBERT D. KOCH, New York, N. Y., on the brief), for defendant-appellee.

PER CURIAM:

George Hooper was a longshoreman engaged in the discharge of a deck cargo of lumber from the S.S. "Lumber Carrier," at Bridgeport, Connecticut, on June 27, 1954. He appeals from a judgment, after a non-jury trial, dismissing his complaint in an action against the shipowner based on alleged negligence and unseaworthiness. The deck cargo had been partly unloaded and Hooper and his work partner were making up another draft of lumber to be hoisted off the vessel. While engaged in this operation the remainder of the deck cargo of lumber shifted under his feet and he lost his balance and fell overboard, sustaining the injuries complained of. The evidence gives ample support to the findings that the cargo was properly stowed and that no railings were customarily used or could be used around the deck cargo during the unloading of the lumber. As the shifting of the cargo is a condition inherent in the operation of unloading a deck cargo of lumber, the trial judge properly ruled that there could be no recovery in the absence of proof of improper stowage. This is in accord with our decisions in *Blier* v. *United States Lines Company*, 2 Cir., 1961, 286 F. 2d 920, and *Pinto* v. *States Marine Corporation of Delaware*, 2 Cir., 1961, decided October 26, 1961, which applied the teaching of *Mitchell* v. *Trawler Racer, Inc.*, 1960, 362 U. S. 539, to the effect that the doctrine of seaworthiness requires no more than reasonable fitness for intended use. This doctrine has been repeatedly applied to transitory conditions arising during the operation and unloading of the vessel.

There is nothing to the contrary in *Carabellese v. Naviera Azua, S.A.*, 2 Cir., 1960, 285 F. 2d 355, cert. denied, 1961, 365 U. S. 872. Moreover, *Reddick v. McAllister Lighterage Line, Inc.*, 2 Cir., 1958, 258 F. 2d 297, cert. denied, 358 U. S. 908; *Grilled v. United States*, 2 Cir., 1956, 232 F. 2d 919; *Rich v. Ellerman & Bucknall S.S. Co.*, 2 Cir., 1969, 278 F. 2d 704, and other cases cited by appellant are distinguishable.

Affirmed.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 44—September Term, 1961.

(Argued October 31, 1961 Decided December 15, 1961.)

Docket No. 26937

GEORGE EZEKIEL,

Plaintiff-Appellant,

against

VOLUSIA STEAMSHIP CO. and SUWANEE STEAMSHIP CO.,

Defendants-Appellees.

Before:

CLARK, HINCKS and FRIENDLY,

Circuit Judges.

Plaintiff appeals from a judgment of the District Court for the Southern District of New York, John W. Holland, *J.*,* in favor of defendant in a seaman's personal injury action. Affirmed.

THEODORE H. FRIEDMAN, New York, New York (Jacob Rassner), *for Plaintiff-Appellant.*

ARTHUR M. BOAL, JR., New York, New York (Boal, McQuade & Fitzpatrick), *for Defendants-Appellees.*

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* Of the Southern District of Florida, sitting by designation.

FRIENDLY, Circuit Judge:

Plaintiff, a Honduran seaman, brought this action in 1957, in the District Court for the Southern District of New York, against a Liberian corporation[1] for an injury to his eye suffered while he was chipping rust aboard M/V Arctic Reefer, a Liberian vessel, in Guatemalan waters. The action was brought on the "law" side, and a jury trial was demanded. In the spring of 1961, plaintiff consented to a transfer to the "admiralty" side, withdrew the claims asserted for maintenance and cure and for negligence under the Jones Act, 46 U. S. C. § 688, and agreed to proceed solely on a theory of unseaworthiness. It was stipulated that liability was governed by Liberian law and that Liberia has adopted the nonstatutory general maritime law of the United States.

Plaintiff's evidence on the issue of liability consisted of his own deposition and the testimony of a Captain Mandrill, called as an expert. Shortly after 8 A.M. on May 19, 1956, plaintiff began to chip rust, with a hammer, from a blower on the top of the deck above the engine room. About an hour later a piece of rust flew off and hit his right eye. He was not wearing goggles. He claimed that he had none, that the boatswain kept them, that he had asked the boatswain for some before starting work, and that the boatswain claimed to have no more. He was unable to recall the name of the boatswain, although he had been on the ship for almost a year. Mandrill testified it was bad practice for a boatswain to allow a seaman to chip rust without wearing goggles.

Defendant introduced the deposition of Bodden, the Arctic Reefer's chief officer. His testimony was that each of the seven members of the deck crew, including Ezekiel, had been issued a pair of goggles in March and had been informed that if "at any time the goggles should be lost or

[1] Claims against defendant Suwanee SS. Co. were discontinued.

injured it was their duty to report in order for replacement of a new pair"; that a notice was posted to this effect, stating also that replacements were to be obtained from the chief officer; that, pursuant to a written order from the company, he kept six spare sets of goggles in a locker in his office; that it was the custom on the ship for men to come to him for supplies so maintained; but that Ezekiel had never sought a replacement for his goggles. Bodden testified also that, on two previous occasions, one about a month and the other about a week before the injury, he saw Ezekiel chipping rust with goggles around the neck but not on the eyes, and remonstrated about this; Ezekiel promised to be careful on the first occasion and made no answer on the second. After the accident Bodden asked Ezekiel whether he had his goggles on; Ezekiel answered "No." Bodden asked why, but got no reply.

In giving judgment for the defendant, Judge Holland found, in an opinion delivered at the close of the trial, "that goggles for the prevention of injuries to the eye to be used by a crew member in the chipping of rust were a part of the maintenance of the vessel in question required by the standard of seaworthiness," "that in connection with the performance of a chipping of rust operation, seaworthiness requires the making of goggles available to the crew member who is ordered to perform such an operation," and "that the evidence in the case demonstrates that both of those duties which I have outlined heretofore as to seaworthiness have been met by the respondent." The judge declined a request by plaintiff's counsel to consider more detailed findings and conclusions which counsel wished to prepare.

Reading the findings together as we must, the last quoted finding means at least that the judge had determined, as he was amply warranted in doing, that goggles had been issued to plaintiff, that plaintiff had been instructed to come to the chief officer for a replacement if they

were lost or damaged, and that replacements were available. It could mean also that the judge completely discredited plaintiff's story about the unsuccessful request to the anonymous boatswain, or even that the judge thought plaintiff had the goggles with him but failed to put them on, as, according to Bodden, he had failed twice before. The judge would have been entitled to come to any of these conclusions although plaintiff was not before him, in view of the contradictions between plaintiff's and Bodden's versions of the goggle situation, see *Noland* v. *Buffalo Ins. Co.*, 181 F. 2d 735, 738 (8 Cir. 1950). Even if the judge did not intend any finding on the truth of plaintiff's story, we could supplement his findings by ourselves weighing plaintiff's testimony against Bodden's; indeed, we could do this even if this appeal were one governed by the Federal Rules of Civil Procedure rather than by the Admiralty Rules, see *Westley* v. *Southern Ry.*, 250 F. 2d 188 (4 Cir. 1957); *Burman* v. *Leukin Const. Co.*, 149 F. 2d 827 (D. C. Cir. 1945); *cf.* 5 Moore, Federal Practice (1951), § 52.04, However, it is unnecessary for us to supply such additional findings or to remand to the district judge, since even without them the judgment must be affirmed.

At the outset, it is clear that a ship is not rendered unseaworthy simply because rust accumulates and has to be removed, see *Lind* v. *American Trading & Production Corp.*, 294 F. 2d 342 (9 Cir. 1961). Nothing was shown to be wrong in the quantity or quality of the ship's gear, we have already noted that the judge's findings, supported by the evidence, mean at least that goggles had been issued and that an adequate number of spares were maintained and were available to the crew for proper purposes. The evidence did not require a finding of a deficiency in the ship's procedure with respect to the use of goggles; the judge was not bound to accept the opinion of plaintiff's expert that good procedure requires that boatswains take affirmative action to see to it that crewmen, who have been furnished goggles and instructed to wear them, do so at

all times. Even if plaintiff's testimony were to be taken at face value, it did not compel the judge to find that the single alleged misfeasance by the boatswain made him not "equal in disposition and seamanship to the ordinary men in the calling." *Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515, 518 (2 Cir.), cert. denied, 343 U. S. 966 (1952); *Boudoin* v. *Lykes Bros. S.S. Co.*, 348 U. S. 336 (1955). The only remaining basis of liability would be the boatswain's alleged action standing by itself. But we have just reaffirmed, without disagreement on that point, that allegedly imprudent action by a seaman's superior is not within the concept of unseaworthiness even though it may be within that of negligence, *Pinto* v. *States Marine Corporation of Delaware*, ——F. 2d —— (2 Cir. 1961), petitions for rehearing and rehearing *in banc* denied, Nov. 20, 1961, as was held long ago in *The Osceola*, 189 U. S. 158 (1903), and *Chelentis* v. *Luckenbach SS. Co.*, 247 U. S. 372 (1918), and recently in *Imperial Oil Ltd.* v. *Drlik*, 234 F. 2d 4 (6 Cir. 1956); *Penedo Cia Naviera S.A.* v. *Maniatis*, 262 F. 2d 284 (4 Cir. 1959); and *Lind* v. *American Trading & Production Corp., supra*; see Gilmore & Black, The Law of Admiralty (1957), 320, and Judge Learned Hand's discussion in *Grillea* v. *United States*, 232 F. 2d 919, 922 (2 Cir. 1956). Liberia has chosen not to adopt United States statutory law making negligence as well as unseaworthiness a ground for recovery; it is not for us to force that upon her. Since the judge below found the claim of unseaworthiness not proved, there was of course no occasion for him to make findings on the issue of contributory negligence or to apportion damages, as would have been required in the event of a contrary conclusion as to unseaworthiness.

Affirmed.

CLARK, *Circuit Judge* (dissenting):

The undisputed testimony established that plaintiff, an 18-year-old seaman, was chipping rust with a hammer from a blower on the ship's deck; that he was not wearing goggles; and that as a result of this failure a piece of rust hit his right eye. Plaintiff's expert witness, Captain Mandrill, testified that chipping is "hazardous" and that the wearing of goggles is necessary in such an operation. He further stated that a good boatswain who observed a man chipping rust without goggles would make him put them on. At trial, Judge Holland found that a ship must provide crew members chipping rust with "goggles for the prevention of injuries to the eye" in order to meet the standard of seaworthiness. Nevertheless he found that this duty had been met, and accordingly gave judgment for defendant. The question on this appeal is whether defendant's steps taken to provide goggles excuse it from liability for unseaworthiness.

It seems very difficult for courts to accustom themselves to the strict liability of unseaworthiness, perhaps because it is cut on such a different pattern than the familiar negligence action. The duty it creates is absolute; the exercise of due care will not discharge this obligation. If an injury occurs as a result of an unseaworthy condition it matters not what efforts the defendant took, or might have taken, to avoid the injury. Blameless he may be; nevertheless he is liable. *Mitchell v. Trawler Racer, Inc.*, 362 U. S. 539; *Seas Shipping Co. v. Sieracki*, 328 U. S. 85; *Van Carpals v. S.S. American Harvester*, 2 Cir., Dec. 13, 1961. He is liable even if the unseaworthy condition is created by the negligence of the plaintiff. *Grillea v. United States*, 2 Cir., 232 F. 2d 919, 923. As Judge Learned Hand said in that case: "It may appear strange that a longshoreman, who has the status of a seaman, should be allowed to recover because of unfitness of the ship arising from his own conduct in whole or in part. However, there is in this nothing

inconsistent with the nature of the liability because it is imposed regardless of fault; to the prescribed extent the owner is an insurer, though he may have no means of learning of, or correcting, the defect. Indeed as to these it is a kind of 'Workmen's Compensation Act'; though limited by the value of the ship and by the fact that it only covers injuries caused by the defects that we have mentioned." Hence the sole question before us is whether an unseaworthy condition existed and caused the plaintiff's injury.

Liability for failure to furnish a seaworthy vessel is absolute, but a vessel need not be accident-free to be "seaworthy." Liability for injuries caused by the vessel and its appurtenances accrues only when the owner has failed to furnish a vessel and appurtenances "reasonably fit for their intended use." *Mitchell* v. *Trawler Racer, Inc., supra,* 362 U. S. 539, 550. On the other hand, this does not mean, as my brothers seem to believe, that he must make only reasonable efforts to furnish seaworthy appliances. He has an absolute duty to furnish a reasonably fit ship.

My brothers accept the proposition that a vessel is not seaworthy unless goggles are provided for tasks such as were here involved. Nevertheless they believe that the ship and its appurtenances were "reasonably fit for their intended use," apparently because steps were taken to make the goggles available. This view confuses the nature of the obligation, however, because it suggests that liability is limited to defendant's negligence. It seems to be an attempt to introduce negligence concepts by the back door, as it were, utilizing the rule that seaworthy ship and its appurtenances need only be "reasonably fit for their intended use" to evade the Supreme Court's repeated admonitions that "the duty to provide a seaworthy ship depends not at all upon the negligence of the shipowner or his agents." *Mitchell* v. *Trawler Racer, Inc., supra,* 362 U. S. 539, 548. See also *Pope & Talbot, Inc.* v. *Hawn,* 346 U. S. 406; *Alaska S.S. Co.* v. *Petterson,* 347 U. S. 396; *Rogers* v.

United States Lines, 347 U. S. 984; *Boudoin* v. *Lykes Bros. S.S. Co.*, 348 U. S. 336.

If the fact that a seaman is not wearing goggles while engaged in rust-chipping is itself an unseaworthy condition, the defendant is liable, whatever steps it took, unsuccessfully, to see that they were worn. The precise question whether such a condition is unseaworthiness has never been decided, but the guiding principles are clear. Failure to provide an appliance necessary for safe completion of shipboard operations will render a ship unseaworthy. *Poignant* v. *United States*, 2 Cir., 225 F. 2d 595; *The T. J. Hooper*, 2 Cir., 60 F. 2d 737, certiorari denied *Eastern Transportation Co.* v. *Northern Barge Corp.*, 287 U. S. 662. See also dissenting opinion of Harlan, J., *Mitchell* v. *Trawler Racer, Inc.*, *supra*, 362 U. S. 539, 576. If safe appliances are available, moreover, but due to the negligence of plaintiff or a co-worker they are not used, the vessel may thereby be rendered unseaworthy. *Grillea* v. *United States*, *supra*, 2 Cir., 232 F. 2d 919. And the doctrine is not limited to instances of initial unseaworthiness, but applies to transitory conditions arising in the course of the ship's operations. *Mitchell* v. *Trawler Racer, Inc.*, *supra*, 362 U. S. 539.

If a ship furnishes an appliance which cannot be used in a normal manner without a safety device or without certain precautions being taken, then if the device is not furnished or the precautions not taken, the ship is unseaworthy. *Krey* v. *United States*, 2 Cir., 123 F. 2d 1008 (shipboard shower without handle); *Campbell* v. *Tidewater Associated Oil Co.*, D. C. S. D. N. Y., 141 F. Supp. 431 (tank with cleats for climbing, but not handrails). Thus, for example, if a ship had on it a pump which sprayed acid in the course of its use, so that it could be safely used only if a movable plastic shield were placed over it, the ship would be unseaworthy if no shield were installed. Even if there were a shield, but the pumpman negligently set

it aside, the shipowner, it would seem clear, would be liable if as a result the pumpman was injured.

These principles control this case. I can see no functional difference between the goggles here and the shield in the hypothetical situation. A dangerous condition was created by the fact that a necessary safety appliance was not employed. There is no dispute that the injury would not have occurred had Ezekial been wearing goggles. Since he did not use them, the further question whether the goggles were "reasonably fit for their intended use" does not arise. Goggles were necessary if rust was to be chipped safely; thus the duty to see that they were used was absolute.

The doctrine of unseaworthiness imposes strict liability in order to promote the taking of greater precaution at sea, because such liability is considered necessary to protect seamen against the special hazards and conditions of maritime service and because the owner "is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost." *Seas Shipping Co.* v. *Sieracki*, *supra*, 328 U. S. 85, 94. Liability here fosters all these ends. I must therefore disagree with Judge Holland and my brethren, and hold the ship unseaworthy under current statements of that principle. The judgment should be reversed and the action remanded for the award of damages.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 86—September Term, 1961.

Submitted November 9, 1961.

Decided December 26, 1961.

Docket No. 26592

GEORGE RICHTER,

Libelant-Appellant,

—v.—

MATHIESEN'S TANKER INDUSTRIES, INC., and S.S. MICHAEL J., her engines, hull, tackle, cargo and her appurtenances thereof,

Respondents-Appellees.

Before:

LUMBARD, *Chief Judge*,
MEDINA,
WATERMAN, *Circuit Judges*.

Libelant appeals from a decree adverse to him entered in the United States District Court for the Southern District of New York, after a hearing before Noonan, *J.*, sitting in admiralty without jury. Decree below affirmed.

JACOB RASSNER, New York City, for Libelant-Appellant.

CICHANOWICZ & CALLAN (VICTOR S. CICHANOWICZ, of counsel), New York City, for Respondents-Appellees.

PER CURIAM:

Libelant appeals from a decree in admiralty adverse to him and claims that the trial judge, who tried the case without jury, erred in that he found the S.S. *Michael J.* not to have been unseaworthy.

The court below found that the libelant, while checking an inventory of spare parts that were stored on shelves in a small storeroom located off the engineroom, stood on a metal shelf about one foot off the deck in order to reach an upper shelf with his right hand, steadied himself with his left hand, and somehow fell from this position and landed on the deck, injuring himself. There was no oil or dirt on the floor of the storeroom, and at trial the libelant, to support his claim of unseaworthiness, sought to prove that there should have been a ladder available that he could have used. On appeal, libelant also asserts in his brief that the metal shelf was slippery, a claim that does not appear to have been made at trial.

The court below found that the use of a ladder in this small storeroom would not have been feasible.

We have reviewed the material presented to us on appeal, and approve the findings of fact and conclusions of law of the trial judge. A small sized storeroom having a top shelf beyond easy arm's reach does not create an unsafe place to work, nor does the existence of such a storeroom on a merchant vessel cause that vessel to be unseaworthy. The fact that on a vessel an accident occurred and a seaman was injured in the course of his duties does not, without more, prove that the vessel was unseaworthy. We conclude, as the judge below concluded, that the libelant has produced no credible evidence whatever to support his claim of unseaworthiness.

Affirmed.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of October, one thousand nine hundred and sixty-one.

Present:

HON. EDWARD J. LUMBARD,
Chief Judge.

HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges.

RAUL PINTO,

Plaintiff-Appellant,

v.

STATES MARINE CORPORATION OF DELAWARE,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARO,
Clerk.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of November, one thousand nine hundred and sixty-one.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge.

HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYES,
HON. THURGOOD MARSHALL,
Circuit Judges.

RAUL PINTO,
Plaintiff-Appellant,

v.

STATES MARINE CORPORATION OF DELAWARE,
Defendant-Appellee.

A petition for a rehearing in banc having been filed herein by counsel for the Appellant.

Upon consideration thereof, it is

ORDERED that the said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of November, one thousand nine hundred and sixty-one.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge.

HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges.

RAUL PINTO,
Plaintiff-Appellant,

v.

STATES MARINE CORPORATION OF DELAWARE,
Defendant-Appellee.

A petition for a rehearing having been filed herein by counsel for the Appellant.

Upon consideration thereof, it is

ORDERED that the said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of November, one thousand nine hundred and sixty-one.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge.

HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN,
Circuit Judges.

GEORGE HOOPER,

Plaintiff-Appellant,

v.

A. L. BURBANK & CO., LTD., and TERMINAL STEAMSHIP CO.,

Defendant-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of Said District Court be and it hereby is Affirmed; with costs to the appellee.

A. DANIEL FUSARO,
Clerk.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of December, one thousand nine hundred and sixty-one.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN,
Circuit Judges.

GEORGE RICHTER,
Libelant-Appellant,

MATHIASEN'S TANKER INDUSTRIES, INC., and S. S. MICHAEL J., her engines, hull, tackle, cargo and her appurtenances thereof,
Respondents-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the appellees.

A. DANIEL FUSARO,
Clerk.

UNITED STATES COURT OF APPEALS

For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of December, one thousand nine hundred and sixty-one.

Present:

Hon. Charles E. Clark,
Hon. Carroll C. Hincks,
Hon. Henry J. Friendly,
Circuit Judges.

George Ezekiel,
Plaintiff-Appellant,

v.

Volusia Steamship Co., and Suwanee Steamship Co.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of Said District Court be and it hereby is affirmed; with costs to the appellees.

A. Daniel Fusaro,
Clerk.